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In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

BENNE KATZ, ALFRED FINKEL, AND MURRAY KATZ, d/b/a WILLIAMSBURG STEEL PRODUCTS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this case on April 11, 1961.

OPINIONS BELOW

The decision of the court of appeals (App. B, *infra*, pp. 17-42) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 13-37)[1] are reported at 126 NLRB 288.

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[1] "R." refers to the portions of the record printed as an appendix to the brief filed by the Board in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1961 (App. B, *infra*, p. 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether there is a violation of Sections 8(a)(5) and (1) of the National Labor Relations Act when, prior to the discontinuance of collective bargaining negotiations and the existence of any possible impasse, an employer, without notice to or consultation with the employees' bargaining representative, unilaterally places in effect new wage rates substantially in excess of those offered the representative, changes the sick leave policy, and grants numerous merit increases.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. 14-16.

STATEMENT

I. The Board's Findings of Fact

On July 5, 1956, the Board certified Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL-CIO, herein called the Union, as collective bargaining representative of all technical employees at respondent Company's plant (R. 20; 6, 45). On the same day, the Board also issued separate certifications to the Union for similar units of employees at Superior Fire Proof Door and Sash Company, Triangle Steel Products Company, World Steel Products Corp., Pioneer Fire Proof Corp., and

City Steel Door Corp. (R. 20; 48). All of these employers, including the Company, were members of the Hollow Metal Door and Buck Association, herein called the Association (R. 20-21; 48).

On July 11, 1956, the Union, by letter, requested that the Company and the five other employers make arrangements as quickly as possible "for either individual or Association wide bargaining," and stated that within seven or eight days the Union would submit its proposal for a collective bargaining agreement (R. 21; 52, 261-262). The letter noted that, in accordance with "previous discussions and mutual understanding, the wage rates and/or increases shall be negotiated on an individual Employer basis * * *" (R. 21; 52, 261-262). On July 19, the Union in a letter to the Company and the same five employers set forth various subjects for collective bargaining (R. 21; 53, 263-267). The Union again stated that wage rates and increases were to be negotiated on an individual company basis (R. 21; 53, 266).

When the Company did not reply to these letters, J. L. Raimist, the Union business manager, put in several phone calls to Sidney D. Raphael, attorney for the Company and Association. No meeting was held until August 30, 1956, however (R. 21; 53-54). Eleven additional meetings were conducted between October 2, 1956, and May 13, 1957, but no final agreement was reached and no further negotiations occurred (R. 21; 58-69, 70-91). During the negotiations and prior to the existence of any impasse, the Company took the following unilateral actions with respect to wages and related benefits:

1. In its communication to the Company on July 19, 1956, the Union specifically mentioned merit increases

as one of the proposed subjects for collective bargaining. (R. 26; 53, 264). Raimist testified that, at the first meeting on August 30, it was "definitely established that there would be a joint review on merits," but that the details would be worked out at later meetings (R. 26; 57). On the other hand, Alfred Finkel, the Company partner responsible for labor relations, who participated in all the meetings, testified that at the August 30 meeting, and on October 2 and October 10, the subject was merely mentioned with the understanding that negotiations could be conducted at a later date (R. 26; 240, 248, 254). Nevertheless, in October 1956, the Company, without notice to or negotiation with the Union, granted 34 merit increases, and in January 1957, granted 20 similar merit increases (R. 26; 98-113, G.C. Ex. 30(a), (b), (c)). On several occasions Raimist vigorously protested that this action by the Company tended "to destroy the Union" (R. 26; 95).

2. On or about March 11, 1957, while negotiations were still in progress, the Company notified the employees in the bargaining unit, as well as its office personnel, that it was making a substantial change in its sick leave policy and that the change would be retroactive to January 1, 1957 (R. 27; 116-117, 275-276). The subject of sick leave had been discussed by the parties at three prior meetings, but no agreement had been reached (R. 27; 57, 62-63, 66). As in the case of the merit increases, the Union was not notified, and subsequently it filed a vigorous protest with the Company (R. 27; 76, 268-269). In its reply, the Company asserted that it did "not feel obligated to explain the matter to you or anyone else since we are not as yet

bound to you until an agreement has been reached between us" (R. 27; 76, 270).

3. In April 1957, Ernst Halpern, the Company's chief draftsman and supervisor of the employees in the bargaining unit, announced to the employees "that henceforth an automatic wage increase system would be in operation for them as follows: up to $74.99 per week—automatic increase of $5 per week every three months; from $75 to $90 per week—automatic increase of $5 per week every 6 months; over $90 per week—merit increases review every 6 months, raises to be granted in management's discretion on a merit basis" (R. 27; 177). This action was also taken without notice to or consultation with the Union (R. 27; 90). The increases were substantially better than those that the Company had previously offered the Union (R. 27; 81).

On May 13, 1957, negotiations between the Company and the Union came to an impasse. Subsequently, during the latter part of July, a meeting of the employees in the bargaining unit was held in the Company's drafting room (R. 24; 121-122). This meeting, which was conducted during working hours, lasted approximately two hours (R. 24; 146). Halpern was aware of the meeting, and the employees were paid for the time spent in attendance (R. 24; 180-181). Herbert Jacobson, coordinator for the Company and Halpern's aide, acknowledged that the meeting was convened to "do away with [the Union] as the bargaining agent" because the employees felt they "could do a better job [themselves] than * * * the Union had

done" (R. 24; 123-124). At the meeting, which was also attended by Edwin Wisniewski, the Company's chief draftsman, Jacobson read a proposed contract to be presented to the Company and explained the procedure of decertifying the Union as well as resignation from it (R. 24; 124, 152). By majority vote, the employees decided to present the proposed contract to the Company and to proceed with decertification (R. 24; 124-125). Shortly after this meeting, the Company granted liberal wage increases to nearly every employee in the unit (R. 25; 108-111). The increases exceeded those offered by the Company a few months earlier (R. 25; 81).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found, as had the Trial Examiner, that the Company failed to discharge its bargaining obligation and thereby violated Section 8(a)(5) and (1) of the Act when, "without notifying or consulting with the Union," it granted merit increases in October 1956 and January 1957, changed sick leave policy on or about March 11, 1957, and announced a new automatic wage increase system in April 1957 (R. 13-14, 30-31). The Board further observed, as had the Trial Examiner, that the Company "undertook its unilateral actions before negotiations were discontinued in May, 1957, or before * * * the existence of any possible impasse." (R. 14, 30).

The Board specifically noted that it was construing "the Intermediate Report as finding violations *only* with respect to the above specified unilateral acts"; the Board refused to find that the Company "*generally* bargained in bad faith in the actual negotiations with

the Union," and therefore refused to "adopt the board statement in the Intermediate Report [R. 31] that '* * * Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union * * *'" (R. 14, n. 4 (emphasis added)).

The Board ordered the Company to cease and desist from the specific unfair labor practices found and from otherwise refusing to bargain with the Union. Affirmatively, the Board ordered the Company to bargain with the Union upon request and to post appropriate notices (R. 14-18).

III. The Decision of the Court of Appeals

The court of appeals (Lumbard, C.J., dissenting) held that, absent a finding by the Board that the employer had bargained in bad faith, the unilateral changes in wages and working conditions, even "occurring as they did during the negotiating of a collective bargaining agreement," did not constitute "a refusal to bargain collectively" within the meaning of Section 8(a)(5) of the Act (App. B, *infra*, p. 21).[2] In the Court's view, "a necessary requisite of a Section 8(a)(5) violation is a finding that the employer failed to bargain in good faith" (App. B, *infra*, p. 21), and "the fact of the unilateral change" does not necessarily require that inference. "An opportunity must first be given the employer to rebut the inference, and finally there must be a definite determination of the mental attitude of the employer" (App. B, *infra*, p. 30).

[2] The court noted that "the subject is not generally free from doubt" (App. B, *infra*, p. 21), and that its conclusion was in direct conflict with the decisions of the Courts of Appeals for the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits (App. B, *infra*, p. 32, n. 10).

The court further concluded that the Board's findings of violations of Section 8(a)(1) were not independently based but were "derived from the acts found to have violated § 8(a)(5) and that [those] violations, also, [were] unproved without the necessary finding that the employer failed to act in good faith" (App. B, *infra*, p. 21).

Because the court believed that "the Board's finding of an unfair labor practice impliedly proceeds from an erroneous view that specific unilateral acts, regardless of bad faith, may constitute violations of § 8(a)(5)," it remanded the case to the Board "in order that it may have an opportunity to take additional evidence, and make such findings as may be warranted by the record" (App. B, *infra*, p. 33).

Chief Judge Lumbard, dissenting, agreed with the majority that "the decisions of the Supreme Court reveal that no *per se* test of good faith should be applied and that an employer's intention should be judged in the light of all the circumstances." He believed, however, "that certain unilateral acts during the course of collective bargaining violate § 8(a)(5) apart from any finding with respect to good faith" (App. B, *infra*, p. 37). As he explained (App. B, *infra*, p. 39 (emphasis added)):

> Mere willingness to conclude an agreement with the union does not satisfy the employer's obligation; he must also confer with the union with respect to *each and every subject of mandatory bargaining*. A refusal to bargain within the meaning of § 8(d) need not be a total refusal. If an employer refuses to consult the union as to any subject with respect to which bargaining is man-

datory, he commits an unfair labor practice, no matter how sincere his intent.[8]

REASONS FOR GRANTING THE WRIT

1. As the court below recognizes (App. B, *infra*, p. 32, n. 10), its holding—that an employer, who makes changes in wages and other conditions of employment during negotiation and prior to an impasse without notifying or consulting the employees' bargaining agent, does not violate his bargaining obligation under the Act absent a showing that he was motivated by bad faith—is in direct conflict with the decisions of several other courts of appeal. See *Lloyd A. Fry Roofing Co.* v. *National Labor Relations Board*, 216 F. 2d 273, 276 (C.A. 9); *Armstrong Cork Co.* v. *National Labor Relations Board*, 211 F. 2d 843, 847-848 (C.A. 5); *National Labor Relations Board* v. *Dealers Engine Rebuilders, Inc.*, 199 F. 2d 249, 251-252 (C.A. 8); *Superior Engraving Co.* v. *National Labor Relations Board*, 183

[8] On this reasoning, Chief Judge Lumbard would have found that, by unilaterally changing sick leave policy during the negotiations, "the employer refused to bargain with respect to a mandatory subject of bargaining in violation of § 8(a)(5)" (App. B, *infra*, p. 35). He would also have enforced the "order of the Board insofar as it held the unilateral grant of a wage increase which was higher than that offered to the union to be restraint or coercion under § 8(a)(1)" (App. B, *infra*, p. 36), but would not have found the unilateral wage increase to be a violation of the bargaining obligation because "[b]y the time it was granted, the negotiations had reached an impasse" (App. B, *infra*, p. 41). However, he would have found no violation respecting the merit increases on the ground that they "were part of the existing wage pattern" and were not granted in such a way as to discriminate against union members. That is, in his view, although "a change in merit review *procedure* could not be undertaken unilaterally * * * individual merit reviews are permissible * * *" (App. B, *infra*, p. 41 (emphasis in the original)).

F. 2d 783, 790 (C.A. 7), certiorari denied, 340 U.S. 930. See, also, *National Labor Relations Board* v. *J. H. Allison & Co.*, 165 F. 2d 766 (C.A. 6), certiorari denied, 335 U.S. 814; *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180, 186 (C.A. 4), certiorari denied, 317 U.S. 652. These decisions rest on the contrary principle that unilateral changes in wages and working conditions effected during negotiations are violative of Section 8(a)(5) and (1) of the Act, irrespective of the employer's general motives or the sincerity of his desire to reach a general agreement. Since the issue in the present case continually arises, the conflict of the circuits should be resolved by this Court.

2. Moreover, the holding of the court below is contrary to the principles which are implicit in prior decisions of this Court. See, *e.g.*, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 338-339; *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-686; *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376; cf. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217; *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349.

According to these principles of collective bargaining, terms and conditions of employment are not to be fixed by the employer alone but, if possible, jointly by the representatives of both the union and the employer. The employer therefore has a statutory duty to "meet and treat" with the employees' representative regardless of his good or bad faith. And this duty extends to each and every subject falling within the statutory

phrase "wages, hours, and other terms and conditions of employment."

The court of appeals fell into error by confusing the problem in the present case with the problem presented when an employer takes unilateral action upon a subject *after* consulting, but without the assent of, the union. To change a term of employment unilaterally prior to reaching an impasse and without consulting the union concerning the proposed change denies the union the opportunity to "meet and treat" just as categorically as if the employer had refused even to negotiate concerning the subject matter of the unilateral action.[4] Nor is the case changed by the pendency of general negotiations concerning terms and conditions of employment which may take effect sometime in the future. The unilateral action prejudices the general negotiations and, at the very least, the unilaterally-imposed terms will apply temporarily. There is, of course, the same duty to bargain about temporary conditions of employment as about those of longer duration.

Thus, the case is one in which the employer has, in effect, categorically removed certain terms and conditions of employment from the area of collective bargaining at least for a temporary period. Under such circumstances the Board is justified in concluding that the employer has violated Section 8(a)(1) and (5) with respect to the subject matter of the unilateral action without making any further finding as to

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[4] The same reasoning would also hold true if the employer, after impasse, would unilaterally grant to the employees terms more favorable than those previously discussed with the union. See *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217.

whether, on the subjects on which he did bargain, the employer was negotiating in good faith. Cf. *Richfield Oil Corp.* v. *National Labor Relations Board*, 231 F. 2d 717 (C.A. D.C.), certiorari denied, 351 U.S. 909; *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960. As the Court stated in *May Department Stores Co.* v. *National Labor Relations Board, supra*, 326 U.S. at 384, 385: "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. * * * Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1961.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but

such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an inter-

vening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Sec. 9. (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82—October Term, 1960

(Argued November 15, 1960 Decided April 11, 1961)

Docket No. 26289

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BENNE KATZ, ALFRED FINKEL and MURRAY KATZ, d/b/a WILLIAMSBURG STEEL PRODUCTS COMPANY, *Respondent*.

Before:

LUMBARD, *Chief Judge*,
WATERMAN and MOORE, *Circuit Judges*.

National Labor Relations Board petitions to enforce its order against Respondent on ground that Respondent violated 29 U. S. C. A. §§ 158(a)(1) and 158(a)(5). Enforcement denied. Cause remanded.

WATERMAN, *Circuit Judge:*

The National Labor Relations Board has petitioned this court pursuant to Section 10(e) of the National Labor Relations Act (NLRA) for enforcement of an order of January 22, 1960 it issued against the respondent, Benne Katz, Alfred Finkel and Murray Katz, d/b/a Williamsburg Steel Products Company (Employer).

The General Counsel's Complaint and Notice of Hearing was issued to Employer on September 8, 1958 based upon charges of unfair labor practices made by Architectural & Engineering Guild, Local 66, American Federation of Technical Engineers AFL-CIO (Union). The Complaint alleged that "Employer did refuse and continues to refuse to bargain collectively with Local 66 as the exclusive bargaining representatives of all the [technical engineering em-

ployees of Employer's Engineering Department in New York] in that:

"(a) In or about March 1957, and at various times thereafter to date, Respondent Employer unilaterally changed the terms and conditions of employment relating to sick leave of employees in the unit described above.

"(b) In or about April 1957, and at various times thereafter to date, Respondent Employer unilaterally changed existing wage rates and other terms and conditions of employment of employees in the unit described above.

"(c) Since in or about March 1957, and at various times thereafter to date, Respondent Employer bargained directly and individually with employees in the unit described above * * *, concerning rates of pay, wages, hours of employment, or other terms and conditions of employment.

"(d) In or about June and July 1957, Respondent Employer, through its agents, supervisors or representatives, including Herbert Jacobson and others unknown, aided and assisted employees in the unit described above * * * to repudiate Local 66 as their bargaining representative.

"(e) In or about June, July and August 1957, and at various unknown times thereafter to date, Respondent Employer, in derogation of Local 66's representative status, through Respondent Employer's agents, supervisors or representatives including Jacobson, Wisniewski and others unknown, publicized, sponsored, approved, permitted, attended and participated in meetings on its premises of employees in the unit described above."

These allegations were claimed to constitute separate unfair labor practices with in the meaning of Sec-

tions 8(a)(1) and 8(a)(5) of the NLRA, 29 U. S. C. §§ 158(a)(1), 158 (a)(5).

After Employer's answer was filed a long contested hearing ensued before a Trial Examiner in which, as appears to be normally the case, two completely divergent versions of the history of the collective bargaining of the parties were presented. The Trial Examiner chose to accept the version presented by the Board's counsel, and his findings were unfavorable in every respect to Employer. He found that subsequent to the certification of Union on July 5, 1956 and during the negotiating of an initial collective bargaining agreement the following acts of Employer occurred:

> (a) In October 1956 and January 1957 Employer unilaterally granted merit increases to its employees without notice to or negotiation with Union.
>
> (b) On or about March 11, 1957 Employer unilaterally made a substantial change in its sick leave policy without notice to Union.
>
> (c) In April 1957 Employer announced a new system of wage increases: "These increases were announced without notice to, or consultation with, the Union and were substantially better than what Respondent had previously offered the Union."

The Trial Examiner next considered and rejected the reasons advanced by Employer explaining the action taken. He concluded:

> "Rather than demonstrating bad faith bargaining by the Union, the entire record compels the conclusion that it was Respondent's conduct which brought the negotiations to naught. Thus, Respondent's unilateral action heretofore found, 'while negotiations were still continuing, and in complete disregard of the Union's status, provides the final insight into Respondent's conduct of the

negotiations with the Union. It clearly shows that * * * *Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union as required by the provisions of the Act.'* (Emphasis supplied.)

"On the entire record I find and conclude that by taking the unilateral action above found before any claimed impasse was reached, *and while negotiations were pending,* Respondent did so in clear disregard of its obligation to bargain with the Unon as the exclusive bargaining representative of its employees, and thereby undermined the authority which the Act bestowed upon the Union. By that conduct, Respondent violated Section 8(a) (1) and (5) of the Act. *Medo Photo Supply Corporation* v. *N. L. R. B.,* 321 U. S. 678, 683-684; *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376; *N. L. R. B.* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217."

In a short decision the Board accepted the Examiner's factual findings (a), (b) and (c) above set forth in the second preceding paragraph. It rejected the Examiner's finding that Employer had failed to bargain in good faith,[1] but interpreted the unilateral acts as having been in themselves unfair labor practices within the purview of §§ 8(a) (1) and 8(a)(5).

---

[1] "We construe the Intermediate Report as finding violations only with respect to the above specified unilateral acts. As the General Counsel filed no exceptions, we do not pass on any other allegations in the complaint. There is no allegation in the complaint that the Respondent generally bargained in bad faith in the actual negotiations with the Union. Therefore, we do not adopt the board [sic] statement in the Intermediate Report that '* * * Respondent was merely going through the motions of collective bargaining without a gennine intention of trying to negotiate an agreement with the Union. * * *' "

An order was issued directing Employer to cease and desist from:

(a) "Unilaterally changing wages, rates of pay, or sick leave, or granting merit increases, *or in any similar or related manner refusing to bargain collectively* with [Union] * * *" (Emphasis supplied.)

(b) "Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other conditions of employment with the Union * * *"

And Employer was also affirmatively directed to bargain collectively if requested to do so.

We are of the opinion that the unilateral acts here complained of, occurring as they did during the negotiating of a collective bargaining agreement, do not *per se* constitute a refusal to bargain collectively and *per se* are not violative of § 8(a)(5). While the subject is not generally free from doubt, it is our conclusion that in the posture of this case a necessary requisite of a Section 8(a)(5) violation is a finding that the employer failed to bargain in good faith. Moreover, we conclude that here the § 8(a)(1) violations the Board has found derived from the acts found to have violated § 8(a)(5) and that these violations, also, are unproved without the necessary finding that the employer failed to act in good faith.

I

Section 8(a)(5) provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title."[2]

[2] Section 9(a) of the NLRA, 29 U. S. C. A. § 159(a) provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment: * * *"

Sections 8(a)(5) (then §8(5)) and 9(a) were part of the original National Labor Relations Act of 1935 and were early interpreted to require that in the interest of industrial peace the employer confer and negotiate with the accredited representative of his employees, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). However, the act was not read *to compel agreement*. *NLRB* v. *Jones & Laughlin Steel Corp., supra,* at 45. Therefore, it is not difficult to find a violation of § 8(a)(5) where the employer completely refuses to confer and to negotiate with the union representative of his employees.[3] On the other hand, it is difficult indeed to determine whether the employer is in fact negotiating and conferring in an attempt to resolve differences with his employees, i.e., bargaining "in good faith," once the employer meets the union at the collective bargaining table. Such a determination rests upon a subjective evaluation of the employer's attitude.[4] This evaluation can only be effectively made in terms of the complete bargaining situation.

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[3] For cases finding such violations see *Mays Department Stores* v. *NLRB*, 326 U.S. 376 (1945); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944) discussed *infra*. See also *NLRB* v. *Parma Water Lifter Co.*, 211 F. 2d 258 (9 Cir.), cert. denied, 348 U.S. 829 (1954); *NLRB* v. *Burton-Dixie Corp.*, 210 F. 2d 199 (10 Cir. 1954). Mere attendance at meetings by an employer in order to inform the union that he will not bargain is a refusal to bargain, *NLRB* v. *Israel Putnam Mills*, 197 F. 2d 116 (2 Cir. 1952). The refusal to bargain may concern only one of the many subjects of collective bargaining. See *NLRB* v. *Berkley Machine Works*, 189 F. 2d 904 (4 Cir. 1951) (wages and merit increases); *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (2 Cir. 1950) (group insurance program).

[4] *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (1 Cir.), cert. denied, 346 U.S. 887 (1953). Judge Magruder declared that: "The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." 205 F. 2d at 139-40.

In 1947 Congress re-evaluated the NLRA. At that time there was some concern expressed in the House of Representatives over the vagueness of the concept of the employer's duty to "bargain in good faith." It was suggested that perhaps a statutory definition of "collective bargaining" would solve that vagueness for there would then be an objective standard governing an employer's actions, which, if not met by the employer, would thereby constitute a refusal to bargain and consequently be a violation of §8(a)(5) A formalistic, procedural definition of "collective bargaining" was included in the Bill that passed the House (H. R. 3020, 80th Cong. 1st Sess. § 2(11) (1947)). See I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1947*, at 311. Senate amendments to the House Bill contained no such definition. The Senate desired to retain and make statutory the subjective test developed by adjudication under the original 1935 Act and refused to concur in the inclusion of the rigid definition of "collective bargaining" desired by the House. It was the Senate view that the approach the House proposed would retard rather than advance the course of collective bargaining and the cause of industrial peace, for the employer's true intent would be immaterial and a recalcitrant employer need only *pro forma* comply with procedural provisions to avoid committing an unfair labor practice. A Committee of Conference report recommended the adoption of the Senate's amendment. This report was accepted by both Houses and hence the "good faith" test was enacted into law, becoming Section 8(d) of the present act (29 U. S. C. A. § 158(d)). See H. R. Rep. No. 510, 80th Cong. 1st Sess. 34-35 (1947). It provides:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respects to wages, hours,

> and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *"

And a corresponding duty to bargain in good faith was imposed upon the union by Section 8(b)(3) of that Act which provides that it shall be an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer." 61 Stat. 141 (1947), 29 U. S. C. A. § 158(b)(3). It is significant that this statutory test has remained unchanged from 1947 to date even though the Act was largely amended in other particulars in 1951 and in 1959. Thus the development and future design of the test of "bargaining in good faith" was left to adjudicative development through the decisions of the National Labor Relations Board and of the courts.[5]

The NLRB urges upon this court that unilateral action taken by an employer regarding bargaining matters when employees are represented by a Board certified bargaining agent is completely inconsistent with the principle of collective bargaining and conclusively determines that the employer in so doing was not acting in good faith. The Board cites *NLRB* v. *Crompton-Highland Mills*, 337 U. S. 217 (1949), as authority for this proposition. Admittedly, this approach on the part of the NLRB is consistent with a number of its administrative decisions. See, e.g., *Union Mfg. Co.*, 96 NLRB 792 (1951); *Sullivan Dry Dock & Repair Corp.*, 67 NLRB 627 (1946). Our consideration of *NLRB* v. *Crompton-Highland Mills, supra*, in conjunction with other relevant

[5] See *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-404 (1952) for a summary of the legislative history of the 1947 Act.

Supreme Court cases interpreting § 8(a)(5) and its predecessor § 8(5) convinces us that the NLRB has erred in its interpretation.

NLRB v. *Crompton-Highland Mills, supra; Mays Department Stores Co.* v. *NLRB*, 326 U. S. 376 (1945); and *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678 (1944) were decided under Section 8(5) of the 1935 Act. Both *Medo* and *Mays* are significantly different from the present case. In *Medo* the employer negotiated independently with a group of employees and agreed to grant a wage increase in return for a repudiation of the union. There can be no doubt that this was a flagrant violation of Section 8(5) as a refusal to bargain. *Mays*, too, involved a situation where the employer completely refused to recognize and bargain with the Board certified union. The *Crompton-Highland Mills* case is closer to the case at issue. In *Crompton* there had been extended negotiations which had reached an impasse. Thereafter, without prior consultation with the union, the employer granted a unilateral wage increase substantially in excess of anything previously offered the union. This action was interpreted by the Board to show that the employer was not acting in good faith during the negotiations. The reasons the employer advanced to justify the unilateral increase were rejected by the Board, and it is important to note, of course, that the Board made an express finding that the employer had failed to bargain in good faith. The Court affirmed the Board's findings.

Subsequent to the amendments of 1947 by which, as discussed above, § 8(5) became § 8(a)(5) without any change in text, the Supreme Court decided *NLRB* v. *Insurance Agents' Union*, 361 U. S. 477 (1960); *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958); *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149 (1956); *NLRB* v. *American Nat'l Ins. Co.*, 343 U. S. 395 (1952); *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563 (1950); and *NLRB* v. *Pool Mfg. Co.*, 339 U. S.

577 (1950). *Mexia* and *Pool* were companion cases primarily dealing with a problem which arose with respect to the enforcement of the Board's orders where §8(a)(5) violations had been found. In both cases the "failure to bargain was *manifest from evidence*"[6] of incidents that occurred during negotiations—incidents that included, among others, a unilateral wage increase and the deliberate shunting of union officials from one company official to another, in order to make any progress impossible. Once again the Trial Examiner and the Board concluded that these various incidents indicated "an unmistakable effort to escape genuine collective bargaining." 339 U. S. 563, at 565. In *American National Insurance Co.* the employer, without prior consultation with the union, instituted unilateral changes in working conditions by the establishment of new night shifts and the introduction of a new system of lunch hours. The Trial Examiner found that "upon review of the entire negotiations, including respondent's unilateral action in changing working conditions during the bargaining * * * respondent [employer] had refused to bargain in a good faith effort to reach agreement."[7] This finding was adopted by the Board and subsequently affirmed by the Court of Appeals for the Fifth Circuit, 187 F. 2d 307 (1951). Commenting upon the decision of the Fifth Circuit the Supreme Court said: "* * * respondents' unilateral action in changing working conditions during bargaining *does support a finding* that respondent had not bargained collectively in good faith as required by the Act." 343 U. S. 395, at 401. (Emphasis supplied.) In its later discussion of the question actually before it on appeal, i.e., whether an employer's desire to insert a management function clause

[6] 339 U.S. 563, at 565.

[7] This language, 343 U.S. 395, at 400, is the summarization of the Trial Examiner's findings by the Supreme Court.

was a *per se* violation of the Act, the Supreme Court stated that a management functions clause, although it gave an employer the initial responsibility for certain working conditions, was assuredly a valid clause. Therefore, bargaining for such a clause was an employer's prerogative—the only requirement being that he bargain for it in good faith. The Court went on to say: "The court below correctly applied the statutory standard of good faith bargaining to the facts of this case. It held that the evidence, *viewed as a whole*, does not show that respondent refused to bargain in good faith by reason of its bargaining for a management function clause as a counterproposal to the Union's demand for unlimited arbitration." 343 U. S. 395, at 409. (Emphasis supplied.)

In *Truitt* the Supreme Court enforced a Board order that the Court of Appeals for the Fourth Circuit had refused to enforce and held that a "refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." 351 U. S. 149, at 153. In order to substantiate his good faith, therefore, an employer could be required to make a reasonable attempt, one not overly burdensome to him, to justify his claim of slender finances. But, said the Supreme Court, "We do not hold * * * that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employers are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not *under the circumstances of the particular case* the statutory obligation to bargain in good faith has been met." 351 U. S. 149, at 153-54. (Emphasis supplied.)[8]

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[8] The Supreme Court in *Truitt* approved of *NLRB* v. *Jacobs Mfg. Co.*, 196 F. 2d 680 (2 Cir. 1952) in which this court enforced a Board order based upon a finding of a lack of good faith on

The employer in Borg-Warner insisted upon the inclusion of certain clauses in the bargaining agreement that the Court held were not the subject of mandatory bargaining under § 8(d), and therefore his insistence was found to demonstrate that the employer was not bargaining in good faith, and, in effect, was committing a *per se* violation of § 8(a)(5). *Borg-Warner* is thus distinguished from *American National Insurance Co.* where the clauses insisted upon were subjects of mandatory bargaining. *Borg-Warner* appears difficult to reconcile with the prior pattern of adjudication which has required a finding of a lack of good faith based on consideration of the *totality* of the collective bargaining events. In a dissenting opinion, 356 U. S. 351, Justice Harlan, joined by Justices Clark and Whittaker, reminded the Court of the long prior history that had avoided rigid restrictions on the bargaining process. He pointed out that unions might be severely circumscribed in their activities if all that unions could bargain for were those matters which were subjects of mandatory bargaining under § 8(d). Moreover, Justice Harlan stated that he was unable to grasp the majority's reasoning that an employer in good faith could propose matters not the subject of mandatory bargaining and that such subjects could properly be included in a collective bargaining agreement, but that the insistence by the employer upon the inclusion of such matters in the agreement was *per se* indicative of a lack of good faith and a violation of the Act.

The Court returned to its former approaches in the next case to come before it. In *NLRB* v. *Insurance Agents' International Union*, 361 U. S. 477, the Court construed § 8(b)(3) of the Act—which, as described above, is as to unions the corollary of Section 8(a)(5)

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the part of the employer because the employer "refused to disclose pertinent facts to show that it had, in good faith, reached its decision that it could not afford to meet the union demands." 196 F. 2d at 684.

—to mean that economic sanctions exerted by a union were not *per se* violative of § 8(b)(3) but the totality of the behavior of the union as portrayed throughout the entire negotiations must be judged by the good faith test. The Court again retraced the history of the affirmative duty placed by the Act upon both union and employer to bargain collectively in good faith. It again conceived the function of the National Labor Relations Board to be that of an agency existing for the purpose of encouraging parties to reach collective bargaining agreements, and that once this function is concluded the parties must be left to their own uninterfered-with devices provided only that they bargain fairly and are desirous of reaching agreement.

Recognizing that so subjective a standard necessarily produces, case by case, many divergent decisions, how, then, should this court approach the unilateral acts of Williamsburg Steel Products Company which the Board urges upon us are *per se* violations of § 8(a)(5)? One scholar in the field has stated the general problem as follows:

> "Whether unilateral action is an unfair labor practice per se depends on whether the National Labor Relations Act seeks to compel joint participation or leaves the joint participation to evolve without additional legal sanction after it has created opposing concentrations of economic power." Cox, *Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1424 (1958).

We are convinced by the legislative and judicial history of the NLRA that it is the latter alternative which the Act contemplates. We believe that with an overall consistency through all the cases, the Supreme Court has concerned itself with the totality of negotiations and has been loath to look at specific acts as being violative of the Act apart from the bargaining totality. *NLRB v. Insurance Agents' International*

Union, supra, the Court's most recent word, supports our position. If the NLRB were given the power to involve itself with the myriad specific acts that make up a labor-management negotiation we would no longer have employer-employee negotiation but enforced governmental arbitration.

It is true, as the Board suggests, that the most plausible inference to be drawn from a unilateral change in working conditions, mandatory subjects of collective bargaining under § 8(d), is that the employer is no longer bargaining in good faith. And the nature and extent of the changes so instituted may give added weight to such an inference.[9] However, the fact of the unilateral change does not require the inference of a failure to bargain in good faith and the consequent finding that there has been a violation of § 8(a)(5). The evidence must be tested within the framework of the entire bargaining situation. An opportunity must first be given the employer to rebut the inference, and finally there must be a definite determination of the mental attitude of the employer. The language of the Supreme Court indicates that, beginning with *Crompton* and concluding with *Insurance Agents' Union*, the above described approach is the correct one.[10]

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[9] Compare *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (7 Cir. 1951) with *NLRB* v. *National Shoes*, 208 F. 2d 688 (2 Cir. 1953).

[10] We are reinforced in our approach by the history of § 8(a)(5) in our own Circuit. *NLRB* v. *Jacobs Mfg. Co.*, *supra* at footnote 8, defined bargaining in good faith to mean "cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments." 196 F. 2d 680, at 683. Considering the totality of events the court enforced a Board order based upon a Board finding that the employer had failed to bargain in good faith.

NLRB v. *Century Cement Mfg. Co.*, 208 F. 2d 84 (2 Cir. 1953) applied the test as so defined to an employer who had unilaterally instituted merit raises and wages increases. The court declared

This court is next presented with the problem of whether we ourselves may test the inference arising from Employer's unilateral acts on a petition for enforcement or whether we must remand to the National Labor Relations Board for its initial determination of this issue. In all the Supreme Court cases that we have discussed in which the Board's order was enforced there had been a Board finding that the respondent-employer had failed to bargain in good faith. Here, the Board explicitly declined to do so. Justice Frankfurter, concurring in *NLRB* v. *Insurance Agents' Union, supra*, which struck down the Board's

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that: "Such unilateral action as to subject matter proper for bargaining negotiations was *further evidence* of a failure to bargain in good faith in violation of §§ 8(a)(5) and (1) of the Act." (208 F. 2d 84, at 86) and enforced the Board's order based upon a Board finding that the employer had failed to bargain in good faith. (Emphasis supplied.)

In *NLRB* v. *National Shoes, supra* at footnote 9, the Board petitioned this court for enforcement of its order based upon a finding that the employer refused to bargain. We enforced that order declaring that: "The problem is essentially to determine from the record the intention or the state of mind of respondents [employers] in the matter of their negotiations with the union. In this proceeding, as in many others, such a determination is a question of fact to be determined from the record." 208 F. 2d 691-692. To be sure, there was some gratuitous dicta of which we disapprove to the effect that a unilateral wage increase was a *per se* violation of § 8(a)(5). See also *NLRB* v. *Acme Air Appliance Co.*, 117 F. 2d 417 (2 Cir. 1941); *NLRB* v. *Superior Fireproof Door & Sash Co.* (2 Cir., March 28, 1961).

Cases from other U. S. Courts of Appeals in accord with our own position are: *Joy Silk Mills* v. *NLRB*, 185 F. 2d 732 (D. C. Cir. 1950), cert. denied, 341 U.S. 914 (1951); *NLRB* v. *Reed & Prince Mfg. Co., supra* at footnote 4 (1 Cir.); *NLRB* v. *Landis Tool Co.*, 193 F. 2d 279 (3 Cir. 1952); *NLRB* v. *Norfolk Shipbuilding & Drydock Corp.*, 195 F. 2d 632 (4 Cir. 1952); *White* v. *NLRB*, 255 F. 2d 564 (5 Cir. 1958); *Cone Bros. Contracting Co.* v. *NLRB*, 235 F. 2d 37 (5 Cir.), cert. denied, 352 U.S. 916 (1956); *NLRB* v. *Harris*, 200 F. 2d 656 (5 Cir. 1953); *Majure* v. *NLRB*, 198 F. 2d 735 (5 Cir. 1952); *NLRB* v. *Booker*, 180 F. 2d 727 (5 Cir. 1950); *NLRB* v. *Dixie Motor Coach Corp.*, 128 F. 2d 201 (5 Cir. 1942); *NLRB* v. *Bradley Washfountain Co., supra* at

finding of a *per se* violation, disposed of this problem for us in the following language:

> "In enforcing the duty to bargain *the Board must find the ultimate fact* whether, in the case before it and in the context of all its circumstances, the respondent has engaged in bargaining without the sincere desire to reach agreement which the Act commands. 361 U. S. at 495." (Emphasis supplied.)

This interpretation of the proper duty of the Board is consistent with that found in all of the cases decided by the Court and is in accord with the legislative history of the Act.

In this case the Board has not made a finding that Employer failed to bargain in good faith—in fact, the

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footnote 9 (7 Cir.); *NLRB* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (9 Cir. 1949); *NLRB* v. *Lettie Lee, Inc.*, 140 F. 2d 243 (9 Cir. 1944); *NLRB* v. *F. M. Reeves & Sons, Inc.*, 273 F. 2d 710 (10 Cir. 1959); *NLRB* v. *Hamilton*, 220 F. 2d 492 (10 Cir. 1955).

In the following cases Board orders, based upon a finding of a lack of good faith were enforced, the various courts considering the entire record. However, in each there was language, unnecessary to the decision, that might indicate that unilateral changes in working conditions were *per se* violations of § 8(a)(5). *Great Southern Trucking Co.* v. *NLRB*, 127 F. 2d 180 (4 Cir.), cert. denied, 317 U.S. 652 (1942); *NLRB* v. *Herman Sausage Co.*, 275 F. 2d 229 (5 Cir. 1960); *NLRB* v. *Whittier Mills Co.*, 111 F. 2d 474 (5 Cir. 1940); *NLRB* v. *Barrett Co.*, 135 F. 2d 959 (7 Cir. 1943); *NLRB* v. *Andrew Jergens Co.*, 175 F. 2d 130 (9 Cir.), cert. denied, 338 U.S. 827 (1949). See also *Pacific Gamble Robinson Co.* v. *NLRB*, 186 F. 2d 106 (6 Cir. 1950) (enforcement denied).

For decisions disagreeing with the result reached herein see *Armstrong Cork Co.* v. *NLRB*, 211 F. 2d 843 (5 Cir. 1954); *NLRB* v. *J. H. Allison & Co.*, 165 F. 2d 766 (6 Cir.) (see dissent), cert. denied, 355 U.S. 814 (1948); *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783 (7 Cir. 1950), cert. denied, 340 U.S. 930 (1951); *NLRB* v. *Dealers Engine Rebuilders*, 199 F. 2d 249 (8 Cir. 1952); *Lloyd A. Fry Roofing Co.* v. *NLRB*, 216 F. 2d 273 (9 Cir. 1954).

Trial Examiner's finding of bad faith was expressly rejected by it. Although we might, therefore, be justified in denying enforcement without remand, we think that since the Board's finding of an unfair labor practice impliedly proceeds from an erroneous view that specific unilateral acts, regardless of bad faith, may constitute violations of § 8(a)(5), the case should be remanded to the Board in order that it may have an opportunity to take additional evidence, and make such findings as may be warranted by the record.

II

There remains for our consideration the Board's finding that the unilateral acts were violative of § 8(a)(1) as well as § 8(a)(5). Section 8(a)(1) provides:

> "(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

This subsection is broadly drawn and it guarantees to employees their basic rights under the NLRA. Necessarily it encompasses many of the more specific violations contained in the succeeding subsections 8(a)(2)-8(a)(5). It has become customary for the Board to find that activities violative of subsections of § 8(a) that follow § 8(a)(1) are also violative of § 8(a)(1). In a Section 8(a)(5) situation this often results in a Board finding that the employer has failed to bargain in good faith in violation of § 8(a)(5), and that this failure to bargain in good faith is an interference with the exercise of the rights of his employees and thereby violative of § 8(a)(1). See *NLRB* v. *Crompton-Highland Mills, supra; NLRB* v. *Express Pub. Co.*, 312 U.S. 426 (1941; *NLRB* v. *National Shoes*, 208 F. 2d 688 (2

Cir. 1953; *NLRB* v. *Niles-Bement Pond Co.*, 199 F. 2d 713 (2 Cir. 1952). The situation just described is different from ones where there are separate independent acts that violate § 8(a)(1). See, e.g., *Mays Department Stores* v. *NLRB, supra; Medo Photo Supply Corp.* v. *NLRB, supra.* We have a situation before us in which the section 8(a)(1) violations were derivative —similar to the cases cited above and very different from *Mays.*

The complaint stated that Employer refused to bargain, enumerated the acts which evidenced the refusal to bargain, and charged that therefore §§ 8(a)(1) and 8(a)(5) were both violated. The Trial Examiner found that Employer had violated his duty to bargain with Union under § 8(a)(5) and hence also violated § 8(a)(1). As discussed previously, the Board found Employer's unilateral acts violative of the two sections but rejected the examiner's finding that Employer did not bargain in good faith. However, the Board's order, set out herein, was directed exclusively to the refusal to bargain. This history leads us to believe that the complaint was based upon an alleged § 8(a)(5) refusal to bargain, that the alleged § 8(a)(1) violations are derivative only, and that the finding that § 8(a)(1) has been violated must be reviewed in the light of the review we have ordered the Board to make with respect to its finding that § 8(a)(5) was violated.

Enforcement denied. Cause remanded to the National Labor Relations Board for further proceedings consistent with this opinion.

LUMBARD, *Chief Judge* (dissenting):

In my opinion there is support in the record for the Board's finding that the employer coerced and restrained the employees in violation of § 8(a)(1) of the National Labor Relations Act, 28 U.S.C. § 158(a)(1),

by granting a unilateral wage increase higher than that offered to the union. I think there is also sufficient evidence in the record to support the Board's conclusion that the employer refused to bargain with respect to a mandatory subject of bargaining in violation of § 8(a)(5) by unilaterally changing sick leave policy during the negotiations. I would not remand the case to the Board to make a finding with regard to the employer's good faith since no allegation of bad faith bargaining was made in the complaint and there is insufficient evidence in the record as a whole to support a finding that the employer bargained in bad faith. I would modify the order of the Board so as to prohibit only the general wage increase and the change in sick leave policy, and I would grant enforcement of the order as modified.

As I read Judge Waterman's opinion, the majority's view is that the acts committed here by the employer could amount to unfair labor practices only if the Board found that the employer was bargaining in bad faith and had no intention of reaching an agreement with the union. I think that neither reason nor precedent supports these conclusions.

I.

My brethren dispose of the charges made against the employer for violation of § 8(a)(1) of the Act by deciding that they were "derivative" and dependent on the finding that § 8(a)(5) had been violated. I disagree. The language of both the complaint filed with the Board and the Intermediate Report of the Trial Examiner reveal that separate § 8(a)(1) violations were alleged and found.[1]

[1] After listing the various unilateral acts which the majority opinion quotes *supra* at pages 1336, 1337 and 1338, the complaint read as follows:

"11. By the acts described above in paragraph 10, *and by each of said acts*, Respondent Employer did engage in and is

I would enforce the order of the Board insofar as it held the unilateral grant of a wage increase which was higher than that offered to the union to be restraint or coercion under § 8(a)(1). Had the wage increase been equal to or less than the proposal made to the union, it would not have violated § 8(a)(1). *NLRB* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (7 Cir. 1951); see *NLRB* v. *Crompton-Highland Mills*, 337 U. S. 217, 224-25 (1949). But the employer's more generous offer to the employees individually than the one made to their union representatives could only have induced them to abandon the union, which they soon did by decertification proceedings. See *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678, 684

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engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

12. By the acts described above in paragraph 10, *and by each of said acts*, Respondent Employer did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act." [Emphasis supplied.]

The Intermediate Report of the Trial Examiner listed the following among the Conclusions of Law:

"4. By failing to perform its obligation to bargain in good faith with the Union in October 1956, and thereafter, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

5. By unilaterally granting merit increases in October 1956, and in January 1957, by unilaterally changing its sick leave policy on or about March 11, 1957, and by unilaterally granting wage increases in April 1957, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

These rulings, affirmed by the Board, clearly distinguish between the § 8(a)(1) and the § 8(a)(5) violations. Conclusion of Law 5 found expressly that the unilateral acts, apart from the Examiner's finding of bad faith, interfered with, restrained, and coerced employees in violation of § 8(a)(1).

(1944). The effect of a substantial unilateral wage increase greater than that offered to the union is to disparage the union and thereby coerce the employees to bargain individually; "such action in itself constitutes an unfair labor practice." *NLRB* v. *National Shoes, Inc.*, 208 F. 2d 688, 692 (2 Cir. 1953).

Whether § 8(a)(1) has been violated depends not on the employer's intent but on whether the act in question would tend to discourage union membership. *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719 (2 Cir. 1953), aff'd 347 U. S. 17 (1954); see *Time-O-Matic, Inc.* v. *NLRB*, 264 F. 2d 96, 99 (7 Cir. 1959). The substantial unilateral wage increase not only tended to have such an effect but was probably instrumental in the employees' ultimate decision to decertify. I would hold it to be a violation of § 8(a)(1).

II.

With respect to the obligations imposed by § 8(a)(5), my brethren would hold that so long as an employer intends in good faith to reach an agreement no violation can be found. I agree that the decisions of the Supreme Court reveal that no *per se* test of good faith should be applied and that an employer's intention should be judged in the light of all the circumstances. However, I believe that more is demanded of an employer by § 8(a)(5) than merely a sincere desire to reach an agreement, and I would therefore hold that certain unilateral acts during the course of collective bargaining violate § 8(a)(5) apart from any finding with respect to good faith. Thus, I would enforce the Board's order insofar as it held that the change in sick leave policy was an unfair labor practice under § 8(a)(5).

Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." The

statute defines the duty of collective bargaining in § 8(d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * * "

One duty imposed upon the parties by § 8(d) is that of approaching the bargaining table with a sincere desire to reach an agreement. The ultimate issue for the Board and the courts with respect to this obligation is whether the respondents' acts at the bargaining table were sham and whether it in fact wished to avoid an agreement. *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1 Cir.), *cert. denied* 346 U. S. 887 (1953); see *NLRB* v. *Insurance Agents Int'l Union*, 361 U. S. 477, 504, 514 (1960) [Frankfurter, J., concurring]. The Board here refused to adopt the Trial Examiner's finding that the "Respondent was merely going through the motions of collective bargaining without a genuine intention of trying to negotiate an agreement with the Union," and I believe it was correct in doing so. The evidence in the record shows that the parties had seven meetings between August 20, 1956 and December 5, 1956, at which they discussed many provisions to be incorporated into a collective-bargaining agreement, and the employer's readiness to compromise on several issues belies any contention that it did not wish to conclude an agreement.

But § 8(d) requires more than just a willingness to enter into a contract. It directs not only that the

parties confer in good faith, but that they do so "with respect to wages, hours, and other conditions of employment." The Supreme Court has read this language to establish certain "subjects of mandatory bargaining" which cannot be unilaterally withdrawn from the list of those to be bargained about. *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349 (1958). Mere willingness to conclude an agreement with the union does not satisfy the employer's obligation; he must also confer with the union with respect to each and every subject of mandatory bargaining. A refusal to bargain within the meaning of § 8(d) need not be a total refusal. If an employer refuses to consult the union as to any subject with respect to which bargaining is mandatory, he commits an unfair labor practice, no matter how sincere his intent. See, e.g., *NLRB* v. *Niles-Bement-Pond Co.*, 199 F. 2d 713 (2 Cir. 1952) [Christmas bonuses]; *NLRB* v. *Proof Co.*, 242 F. 2d 560 (7 Cir.), *cert. denied* 355 U. S. 831 (1957) [seniority provisions and bulletin board use]. The policy underlying such a rule is that to which Professor Cox alluded in the passage immediately preceding the one set out in the majority opinion:

> "As in the case of refusal to execute a contract with a union, a distinction should be drawn between inquiring into the employer's state of mind in order to distinguish the sham from the real and condemning conduct which thwarts the policy of making terms of employment depend upon mutual consent." Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1424 (1958).

As I read § 8(d), together with the gloss of the *Borg-Warner* case, Congress has decided that with respect to subjects of mandatory bargaining the decision-making process requires consultation with the union. I do not believe it is necessary to read "confer" in § 8(d) as imposing upon the employer the duty of first obtaining

the *consent* of the union; but it requires, at the very least, that he *discuss* any proposed significant change in conditions of employment with the employees' bargaining representatives.

An employer who, during the course of negotiations, unilaterally, and without notifying the union, institutes a change in one of the conditions of employment as to which collective bargaining is mandatory is, in effect, bypassing the employee representatives and negotiating with individual employees directly. See *May Department Stores Co.* v. *NLRB*, 326 U. S. 376, 384 (1945); *Lloyd A. Fry Roofing Co.* v. *NLRB*, 216 F. 2d 273, 276 (9 Cir. 1954). If an employer is permitted to take unilateral action without even consulting the union, he will be able to undermine negotiations with respect to any one of the mandatory subjects of bargaining as effectively as if he altogether refused to bargain over it. Indeed, the failure to notify the union if there has been an opportunity to do so must in all but the most extreme circumstances signify an intent to deny the employees any role in decision-making with respect to the particular condition of employment which is involved. Such conduct may be entirely consistent with a sincere subjective intent to reach an agreement with the union on all other issues, but irrespective of the employer's state of mind it should constitute an unfair labor practice.

In this case the National Labor Relations Board charged the employer with having violated the duty to bargain by taking three steps unilaterally without notifying the union: granting merit increases, changing sick leave policy, and granting wage increases larger than those offered to the union. In my opinion, the record supports the charge only with respect to the change in sick leave regulations.

In a notice posted at its plant on March 11, 1957, the employer announced that the sick leave rules were being changed so as to allow only five sick days per year in place of ten. Accumulation of unused days was

doubled, so that an employee who used no days was no worse off than he had been under the old plan. However, the change, which was made without notice to the union, certainly affected those who were sick during the year. At that time, negotiations had been suspended for several months, but the sick leave plan was still one of the subjects left open for discussion. By changing the rules without giving the union notice of any intention to do so, the employer disregarded the federal policy calling for joint deliberation between the employer and the union before a change is made. I would hold the unilateral step to be a *per se* refusal to bargain with respect to a subject of mandatory bargaining and a violation of § 8(a)(5).

The merit increases, however, were part of the existing wage pattern and were not granted in such a way as to discriminate against union members. Although a change in merit review *procedure* could not be undertaken unilaterally, *NLRB* v. *Century Cement Mfg. Co.*, 208 F. 2d 84 (2 Cir. 1953); *NLRB* v. *Berkley Machine Works & Foundry Co.*, 189 F. 2d 904 (4 Cir. 1951), individual merit reviews are permissible, *White* v. *NLRB*, 255 F. 2d 564, 574 (5 Cir. 1958); *NLRB* v. *Superior Fireproof Door & Sash Co.*, —— F. 2d ——, —— (Slipsheet 1187, 1198 (2 Cir. 1961)).

Nor can it be said that the unilateral general wage increase was a refusal to bargain, although it amounted to restraint or coercion because it was higher than that offered to the union. See *supra*. By the time it was granted, the negotiations had reached an impasse. Having engaged in fruitless discussions for many months and learning that the union was ready to make few, if any, concessions, the employer was justified, insofar as his duty to bargain was concerned, in presuming that a general wage increase could be instituted unilaterally only. *NLRB* v. *Andrew Jergens Co.*, 175 F. 2d 130 (9 Cir. 1949); see *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939).

I would, therefore, modify the order of the Board so as to find a § 8(a)(1) violation in that the employer offered a greater wage increase to the individual employees than it did to the union and a § 8(a)(5) violation (and, derivatively, another § 8(a)(1) violation) in that the employer refused to bargain collectively about a change in sick leave policy. I would enforce the order as modified.

Judgment

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of April, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BENNE KATZ, ALFRED FINKEL and MURRY KATZ, d/b/a WILLIAMSBURG STEEL PRODUCTS COMPANY, *Respondent*.

Petitions for enforcement from the National Labor Relations Board.

This cause came to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said enforcement be and it

is hereby denied and that the action be and it hereby is remanded to the National Labor Relations Board for further proceedings consistent with the opinion of this Court.

A. DANIEL FUSARO,
Clerk

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